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No. 98-100669

In the Supreme Court of the United States

OCTOBER TERM, 1998

LEVITON MANUFACTURING CO., INC.,
PETITIONER,

v.

RHODE ISLAND INSURERS' INSOLVENCY FUND,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Rhode Island Insurers' Insolvency Fund (the "Fund") commenced this action to recover workers' compensation benefits paid by the Fund to employees of petitioner Leviton Manufacturing Company, Inc. ("Petitioner") and petitioner's subsidiary, American Insulated Wire Corporation. These payments were made by the Fund pursuant to the Rhode Island Insurers' Insolvency Fund Act (the "Act" or the "1988 Act"), R.I. Gen. Laws § 27-34-1, *et seq.*

Under the net worth recoupment provision set forth in section § 27-34-11(b)(1) of the Act (the "recoupment provision"), any insured with a net worth in excess of $50 million is required to reimburse the Fund for all "covered claims" paid by the Fund on behalf of such insured. Petitioner has a net worth

in excess of $50 million. Despite the plain language of the Act, however, petitioner has refused to reimburse the Fund for "covered claims" paid on petitioner's behalf.

The Fund was established in 1988 with the passage of the Act. 1988 R.I. Pub. Laws ch. 407. *See* R.I. Gen. Laws § 27-34-6. The 1988 Act repealed the insolvency fund act originally enacted in 1970. 1970 R.I. Pub. Laws ch. 166 (the "1970 Act"). The purpose of the Fund is to:

> provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, and to create an entity to assess the cost of such protection and distribute it equitably among member insurers.

R.I. Gen. Laws § 27-34-2. The Act was patterned after model legislation drafted by the National Association of Insurance Commissioners (the "Model Act"). At present, the Model Act has been adopted, with varying modifications, in 49 states.

In general, when an insurer writing insurance in Rhode Island is declared insolvent, the Fund becomes obligated to pay "covered claims" of Rhode Island claimants and insureds which are defined as claims arising out of policies issued by an insolvent insurer. R.I. Gen. Laws § 27-34-8(1). The Fund does not levy assessments to create a fund for future insolvencies. Rather, the Fund operates on a post insolvency assessment basis. After an insolvency occurs the Fund obtains the funds it requires for such insolvency by assessing the Fund's member insurers, R.I. Gen. Laws § 27-34-8(a)(3), who are required to be members of the Fund as a condition of transacting insurance in Rhode Island. R.I. Gen. Laws § 27-34-6. Such insurers, in turn, recoup Fund assessments by passing the cost on to persons who purchase the types of insurance covered by the Fund, in the form of higher rates and premiums. R.I. Gen. Laws § 27-34-15.

The Fund is not the successor of the insolvent insurer. The

successor of the insolvent insurer is the receiver appointed by the court having jurisdiction over the liquidation of the insolvent insurer, generally a court of the insurer's state of domicile. Here, the receiver of petitioner's insolvent insurer is the Commissioner of Insurance of the Commonwealth of Massachusetts. The receiver succeeds to the assets and liabilities of the insolvent insurer and liquidates the insolvent insurer's estate subject to supervision by the appointing court. *See* Mass. Gen. Laws ch. 175, § 180C.

As part of the Act creating the Fund, the Rhode Island legislature included a provision which permits the Fund to recoup from insureds having a net worth greater than $50 million, amounts paid by the Fund on behalf of such insureds. The legislature's recoupment provision was not novel. Of the 49 states having guaranty funds based on the Model Act, seven states[1] have enacted provisions which prohibit guaranty fund coverage for claims against insureds with a net worth greater than a prescribed amount (a "direct prohibition" approach), and eighteen states (including Rhode Island)[2] require the guaranty fund to pay claims and then recoup from the high net worth insured the amount paid (a "recoupment" approach). In either event, in the twenty-five states having

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[1] *See* Arkansas Code Ann. § 23-90-103(2); Colorado Rev. Stat. § 10-4-504; Georgia Code Ann. § 33-36-3(F); Indiana Code § 27-6-8-4(4); Maryland Code Ann., Insurance, § 9-301(d)(2); Michigan Comp. Laws § 500.7025(3); Missouri Rev. Stat. § 375.772(2).

[2] *See* Connecticut Gen. Stat. § 38a-844(4); Delaware Code Ann. tit. 18, § 4211(a)(2); D.C. Code Ann. § 35-3908(b); Hawaii Rev. Stat. § 431:16-111(b)(1); 215 Illinois Comp. Stat. 5/545; Kentucky Rev. Stat. Ann. § 304.36-050(B)(5); Minn. Stat. § 60C.09; Montana Code Ann. § 33-10-114(2); North Carolina Gen. Stat. § 58-48-50(a); Ohio Rev. Code Ann. § 3955.12(B)(1); Oklahoma Stat. tit. 36 § 2010(B)(1); Pennsylvania Stat. Ann. tit. 40, § 991.1816; Rhode Island Gen. Laws, § 27-34-11(b)(1); South Dakota Codified Laws § 58-29A-19.1; Texas Ins. Code Ann. art. 21.28-C; Utah Code Ann. § 31-A-28-207(3)(b); Virginia Code Ann. § 38.2-1609(A)(2); Wisconsin Stat. § 646.31. Certain of these jurisdictions also prohibit guaranty fund coverage for high net worth insureds. *See, e.g.*, 215 Illinois Comp. Stat. 5/543.3(b)(iv).

a net worth provision the high net worth insured is ultimately responsible for payment of such claims.[3]

The recoupment provision contained in section 27-34-11(b)(1) of the Act operates as follows: Where the insured has a net worth of more than $50 million on December 31 of the year next preceding the insurer's insolvency, that insured is required to reimburse the Fund for covered claims paid by the Fund on the insured's behalf.

Petitioner's worker's compensation insurance carrier prior to 1986 was American Mutual Liability Insurance Company ("American Mutual"). At all relevant times, American Mutual was a Massachusetts insurer licensed to transact insurance in Rhode Island. On March 9, 1989, the Massachusetts Supreme Judicial Court for Suffolk County determined that American Mutual was insolvent and ordered American Mutual liquidated. Following the court's determination of American Mutual's insolvency, the Fund became obligated to pay "covered claims" of Rhode Island insureds and claimants arising under American Mutual policies. Included among those obligations were "covered claims" arising under workers compensation policies issued to petitioner. As of June 30, 1995, the Fund had paid over $1.5 million to petitioner's employees.

On December 31, 1988 (the year next preceding American Mutual's insolvency), petitioner had a net worth of more than $50 million. The payments made by the Fund to petitioner's employees satisfied petitioner's liability obligations to those employees. Thus, under the Act, the Fund is entitled to be reimbursed by petitioner. R.I. Gen. Laws § 27-34-11(b)(1).

In its answer to the Fund's complaint, petitioner raised the following affirmative defenses based on the Constitutions of the United States and Rhode Island: (1) equal protection; (2) violation of due process (retroactivity); (3) impairment of contract; and (4) taking without just compensation. The Fund

[3] The Wisconsin Insurance Security Fund Act, § 646.31(12) restricts the amount a high net worth insured may recover from the security fund.

moved for partial summary judgment or, in the alternative, to strike petitioner's constitutional defenses. The trial court granted the Fund's motion for partial summary judgment and held that the recoupment provision of the Act satisfies the requirements of the Due Process, Equal Protection, Takings and Contract Clauses of the United States Constitution and the parallel clauses of the Rhode Island Constitution. *Rhode Island Insurers' Insolvency Fund* v. *Leviton Mfg. Co.*, No. 95-2505, 1996 WL 936930, at *7 (R.I. Super. May 16, 1996), *aff'd*, 716 A.2d 730 (R.I. 1998).

Petitioner appealed to the Rhode Island Supreme Court, but did not appeal the trial court's decision upholding the constitutionality of the recoupment provision under the Takings Clause. *Rhode Island Insurers' Insolvency Fund* v. *Leviton Mfg. Co.*, 716 A.2d 730, 733 n.3 (R.I. 1998). Therefore, the Rhode Island Supreme Court noted that petitioner had waived its defense under the Takings Clause. *Id.* The Rhode Island Supreme Court affirmed the trial court's decision. *Id.* at 737. By its Petition for a Writ of Certiorari, petitioner now seeks review of the Rhode Island Supreme Court's decision under the Due Process Clause and Contract Clause of the United States Constitution. Petitioner does not challenge the Rhode Island Supreme Court's rejection of petitioner's Equal Protection Clause defense.

REASONS FOR DENYING THE PETITION

The petition should be denied because the decision by the Rhode Island Supreme Court is fully consistent with the decisions of this Court and of other courts of appeal, and the petition does not present any issue warranting review.

The Rhode Island Supreme Court correctly decided that the recoupment provision of the Act did not apply retroactively. The court properly determined that the Fund's right of reimbursement under the recoupment provision was triggered by events which occurred *after* the enactment of the Act in 1988, including the insolvency of American Mutual in 1989 and the

Fund's payment of workers' compensation claims on petitioner's behalf following the insolvency of American Mutual. Even assuming *arguendo* that the recoupment provision operates retroactively, any retroactive operation is rationally related to legitimate public purposes and does not deny due process.

The Rhode Island Supreme Court's decision did not "disrupt settled principles of constitutional interpretation" enunciated by the Court in *Eastern Enterprises* v. *Apfel*, __ U.S. __, 118 S. Ct. 2131 (1998). Petition ("Pet.") 7. In *Apfel*, a plurality of justices ruled that the Coal Industry Retiree Health Benefit Act ("Coal Act") improperly placed "a severe, disproportionate, and extremely retroactive burden" on the petitioner in *Apfel* in violation of the Takings Clause. *Apfel*, 118 S. Ct. at 2153. As explained below, the recoupment provision of the Act does not impose a severe, disproportionate or extremely retroactive burden on petitioner. This case is further distinguished from *Apfel* in that this case does not present "the most egregious circumstances" or "one of the rare instances where the Legislature has exceeded the limits imposed by due process." *Apfel*, 118 S. Ct. at 2159 (Kennedy, J. concurring).

Finally, petitioner's contention that the Rhode Island Supreme Court's decision "disrupts settled principles of constitutional interpretation" of the Contract Clause is mistaken. Pet. 7. The Rhode Island Supreme Court correctly applied the Court's test set forth in *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704 (1983) and in doing so properly determined that the recoupment provision does not impair a contractual relationship. Even assuming *arguendo* that the recoupment provision did impair a contractual relationship, the provision does not violate the Contract Clause because it serves a legitimate public purpose and any adjustment of the parties' rights and responsibilities is reasonable and appropriate.

I. THE RHODE ISLAND SUPREME COURT'S DECISION THAT THE ACT COMPORTS WITH THE DUE PROCESS CLAUSE SHOULD NOT BE DISTURBED.

To demonstrate that the Act violates the requirements of due process, petitioner must traverse "unusually inhospitable legal terrain." *In re Chateaugay Corp.*, 53 F.3d 478, 487 (2d Cir.), *cert. denied*, 516 U.S. 913, 116 S. Ct. 298 (1995). Economic legislation such as the 1988 Act is entitled to a considerable presumption of constitutionality and will be upheld unless it is established that the legislature acted in an arbitrary or irrational way. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 2892 (1976). Given this standard of review that is among the most deferential in constitutional jurisprudence, "[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances." *Apfel*, 118 S. Ct. at 2159 (Kennedy, J., concurring). Even when a statute has a retroactive effect, the Due Process Clause is satisfied as long as "the retroactive application of the legislation is itself justified by rational legislative purpose." *Pension Benefit Guar. Corp.* v. *R. A. Gray & Co.*, 467 U.S. 717, 730, 104 S. Ct. 2709, 2718 (1984).

In determining whether the Rhode Island legislature acted in an arbitrary and irrational way in enacting the recoupment provision, the Court looks only to determine whether the legislation is "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp.*, 467 U.S. at 729, 104 S. Ct. at 2717-18. Economic legislation will be sustained so long as any conceivable rational basis exists for the statute under review, regardless of whether the legislature articulated or even considered the rationale. *See FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 2102 (1993) ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature"). In enacting economic legislation, the legislature "had absolutely no obligation to select the scheme that a court later would find to be

the fairest, but simply one that was rational and not arbitrary." *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477, 105 S. Ct. 1441, 1458 (1985). The Rhode Island Supreme Court properly decided that the recoupment provision does not violate the Due Process Clause. The court decided that the recoupment provision does not apply retroactively as applied to petitioner. The court also noted that the recoupment provision was "reasonable and rationally related" to the public purpose underlying the Act, namely, "to preserve the limited resources of the fund by requiring insureds with a net worth in excess of $50 million to reimburse the fund for all payments made in the course of discharging the insured's liability." *Leviton*, 716 A.2d at 734. The Rhode Island Supreme Court's decision that the recoupment provision satisfies the requirements of due process was correct and does not warrant further review.

A. *The Rhode Island Supreme Court Correctly Decided That The Recoupment Provision Of The Act Does Not Apply Retroactively.*

In deciding that the recoupment provision does not operate retroactively, the Rhode Island Supreme Court relied in part on *McAndrews* v. *Fleet Bank of Mass., N.A.*, 989 F.2d 13, 16 (1st Cir. 1993). The Rhode Island Supreme Court's reliance on *McAndrews* was correct.

In *McAndrews*, the First Circuit Court of Appeals held that a Federal statute (FIRREA) which permits the FDIC to enforce contracts previously entered into by failed banks, rendered unenforceable a termination-upon-insolvency clause contained in a lease entered into between the lessor and the bank prior to the enactment of FIRREA. *McAndrews*, 989 F.2d at 16. The court ruled that the FIRREA statute did not operate retroactively even though the lease was entered into prior to the enactment of the FIRREA statute. *Id.* The court ruled that the events triggering the statute's invalidation of the termination-upon-insolvency clause occurred *after* the

enactment of FIRREA. *Id.* FIRREA was only "brought into play through a collocation of circumstances, all occurring well after the law's effective date." *Id.* These circumstances were the FDIC's appointment as receiver and the lessor's attempt to invoke the termination-upon-insolvency clause. *Id.* Thus, the statute was operating prospectively even though it modified the legal effect of a preexisting relationship between the lessor and lessee. *Id.*

Relying on *McAndrews*, the Rhode Island Supreme Court correctly determined that the recoupment provision, as applied to petitioner, does not operate retroactively because the events triggering the recoupment provision occurred after the enactment of the provision. *Leviton*, 716 A.2d at 735. Petitioner does not challenge *McAndrews*. Rather, petitioner argues that the Rhode Island Supreme Court "wrongly applied the trigger theory expressed in *McAndrews.*" Pet. 12. Petitioner attempts to distinguish *McAndrews* on the basis that all of the facts which triggered the application of the statute at issue in *McAndrews* occurred after the statute had been enacted. The facts of this case fit squarely within *McAndrews*. The Rhode Island Supreme Court determined that all of the facts which triggered the Fund's right to reimbursement under the recoupment provision occurred after the enactment of the recoupment provision in 1988, including the insolvency of American Mutual in 1989, the 1989 triggering of the Fund's obligations to pay claims arising under American Mutual policies, and the Fund's actual payment of claims giving rise to petitioner's obligation to reimburse the Fund. *Leviton*, 716 A.2d at 735-36. The Rhode Island Supreme Court's decision is consistent with *McAndrews*.

Petitioner also attempts to distinguish *McAndrews* on the basis that not all of the circumstances affecting petitioner's rights occurred after the enactment of the recoupment provision in 1988, pointing to petitioner's incurring of liability for workers' compensation benefits covered by the pre-1988 American Mutual policies. Pet. 12. The fact that certain circumstances affecting petitioner's rights occurred prior to 1988

does not distinguish this case from *McAndrews*. In *McAndrews*, the lease which contained the termination-upon-insolvency clause was entered into prior to the enactment of the FIRREA statute invalidating such clause. The fact that work-related injuries occurred before the enactment of the Act in 1988 is not controlling because "a statute does not operate retroactively simply because its application requires some reference to antecedent facts." *McAndrews*, 989 F.2d at 16. Further, as noted by the Rhode Island Supreme Court, "[t]he fact that the work-related injuries giving rise to these [workers' compensation] claims occurred prior to the effective date of the act is not controlling since the fund was not obligated to pay these claims." *Leviton*, 716 A.2d at 735.

Contrary to petitioner's assertion, the Rhode Island Supreme Court's decision is consistent with such court's decision in *Liberty Mutual Ins. Co.* v. *Rhode Island Insurers' Insolvency Fund*, 675 A.2d 417 (R.I. 1996). In *Liberty Mutual*, the court held that the legislature intended that the 1988 Act apply to insolvencies occurring after the enactment of the 1988 Act even though the injury covered by the Fund occurred prior to such enactment. The court noted that a "covered claim" is defined by the 1988 Act as "an unpaid claim . . . which arises out of and is within the coverage and subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer becomes an insolvent insurer on or after July 1, 1988." *Liberty Mutual*, 675 A.2d at 418. The Rhode Island Supreme Court's opinion in *Liberty Mutual* is consistent with its decision in this action. Furthermore, petitioner's suggestion that the Rhode Island Supreme Court misapplied its own ruling in *Liberty Mutual* is not one of the "compelling reasons" identified in Rule 10 as grounds for review by this Court.

B. *Petitioner's Reliance On Eastern Enterprises v. Apfel Is Entirely Mistaken.*

Petitioner attempts to apply the "principles enunciated" in *Eastern Enterprises* v. *Apfel*, __ U.S. __, 118 S. Ct. 2131

(1998) in support of petitioner's assertion that the recoupment provision violates the Due Process Clause. Pet. 8-11. In *Apfel*, the plurality held that the Coal Industry Retiree Health Benefit Act (the "Coal Act") violated the Takings Clause because the Coal Act imposed a "severe, disproportionate and extremely retroactive burden" upon Eastern Enterprises ("Eastern") by requiring Eastern to fund lifetime health benefits for coal workers where Eastern had never agreed to fund such benefits. *Apfel*, 118 S. Ct. at 2153.[4] As set forth below, this case, unlike *Apfel*, does not present one of the "rare instances" or "the most egregious of circumstances" where a legislature has targeted an unpopular group for retribution or imposed a severe, disproportionate and extremely retroactive liability in violation of petitioner's due process rights. *Apfel*, 118 S. Ct. at 2159 (Kennedy, J. concurring).

First, petitioner's suggestion that petitioner has been unfairly "targeted" by the recoupment provision of the Act is completely mistaken. In his concurring opinion, Justice Kennedy warned that groups "targeted by retroactive laws, were they to be denied all [due process] protection, would have a justified fear that a government once formed to protect expectations can now destroy them." *Apfel*, 118 S. Ct. at 2159. Likening itself to the targeted former coal employer in *Apfel*, petitioner contends that petitioner is "one of the few companies in Rhode Island that has been subject to the 1988 Act's recoupment provision and can easily be characterized as one of a group 'targeted by retroactive laws.'" Pet. 11 (citing *Apfel*, 118 S. Ct. at 2159 (Kennedy, J. concurring)). Petitioner's assertion is not supported by the record. The recoupment provision applies to all insureds having the requi-

[4] Petitioner does not and cannot rely on the plurality's Takings Clause analysis in *Apfel* because petitioner waived its Takings Clause defense in this case. *Leviton*, 716 A.2d at 733 n.3. Nonetheless, petitioner seeks to apply the "principles or retroactivity" underlying the plurality opinion. Petitioner also relies specifically on Justice Kennedy's concurring opinion, wherein Justice Kennedy advocated using the Due Process Clause to invalidate the Coal Act. *Apfel*, 118 S. Ct. at 2153.

site net worth for all insolvencies occurring after 1988. A number of other high net worth insureds in Rhode Island, including the Roman Catholic Archdiocese of Providence, Brown University and Citizens Bank have all reimbursed the Fund under the recoupment provision of the 1988 Act. App. p. A-1,2 ¶¶4-6. Moreover, in arguing that it has been unfairly targeted by the recoupment provision in Rhode Island, petitioner fails to acknowledge that twenty-four other states have enacted a form of the net worth provision. *See* notes 1-2, *supra*. No one has suggested that such net worth provisions were enacted by such state legislatures "as a means of retribution against unpopular groups or individuals." *Apfel*, 118 S. Ct. at 2159. Rather, such net worth provisions "preserve the limited resources of the fund by requiring [high net worth] insureds . . . to reimburse the fund for all payments made in discharging the insured's liability." *Leviton*, 716 A.2d at 734.

Petitioner's assertion that it has been unfairly targeted by the recoupment provision also fails because there is nothing to suggest that the Rhode Island Legislature enacted the recoupment provision "with an exact knowledge" of who would be subjected to the statute. *Apfel*, 118 S. Ct. at 2159 (Kennedy, J. concurring) (quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960). When the Rhode Island legislature enacted the recoupment provision in 1988, it could not have anticipated that American Mutual would be determined to be insolvent by a Massachusetts court in March of 1989, nor could the legislature have anticipated that upon the insolvency of American Mutual, the Fund would be required under the Act to advance over $1.5 million in workers' compensation payments on behalf of petitioner. Rather, as noted by the Rhode Island Supreme Court, the Rhode Island Legislature enacted the recoupment provision to "preserve the limited resources of the fund by requiring insureds with a net worth in excess of $50 million to reimburse the fund for all payments made in the course of discharging the insured's liability." *Leviton*, 716 A.2d at 734. Petitioner has not been

unfairly targeted for retribution by the recoupment provision.

Nor does the application of the recoupment provision involve an imposition of a "disproportionate liability" as was the case in *Apfel*. Here petitioner's liability for its employees' work-related injuries was not changed by enactment of the recoupment provision. The Rhode Island Worker's Compensation Act ("RIWCA") provides that employees suffering a personal injury arising out of and in the course of employment shall be paid compensation by their employer. R.I. Gen. Laws § 28-33-1. Thus, the liability for compensating employees for work-related injuries has *always* rested with the petitioner as an employer. Under the RIWCA, petitioner was liable for worker's compensation claims before passage of the recoupment provision and the petitioner remains liable after the enactment of the recoupment provision. What the enactment of the recoupment provision accomplished was to provide that, in the event an insurer were to become insolvent, the Fund would make payments to satisfy the liability obligations insured by any such insolvent insurer and would then have the right to recover those payments from high net worth insureds. *Leviton*, 716 A.2d. at 734-35. The amount the Fund seeks to recover from petitioner under the recoupment provision is not a "tenuous" amount calculated "in a vacuum" as was the case in *Apfel*. 118 S. Ct. at 2150. Rather, the Fund seeks dollar for dollar reimbursement of the payments made by the Fund to petitioner's employees which satisfied petitioner's obligations under the RIWCA. Contrary to petitioner's suggestion, Pet. 11, the amount subject to recoupment from petitioner is not disproportionate or arbitrary. Rather the amount subject to recoupment is precisely equal to the liability of petitioner discharged by the Fund's payments. Unlike *Apfel*, where the liability imposed on Eastern was "unrelated" to any injury it caused, 118 S. Ct. at 2151, petitioner's liability here is precisely equal to the injuries caused to petitioner's employees.

Furthermore, the enactment of the recoupment provision did not "destroy reasonable certainties or securities which are

the very objects of property ownership" as was the case in *Apfel*. As the Rhode Island Supreme Court keenly observed, petitioner could not have reasonably expected that the law pertaining to insurance insolvencies in Rhode Island would always remain frozen as it was when petitioner purchased insurance from American Mutual. *Leviton*, 716 A.2d at 737 (citing *Retired Adjunct Professors* v. *Almond*, 690 A.2d 1342, 1345 (R.I. 1997)) (it is unreasonable to conclude that legislative provisions are "fossilized in legislative amber."). *See Pension Benefit Guar. Corp.*, 467 U.S. at 729, 104 S. Ct. at 2718 ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations"). Petitioner had no legitimate expectation that the 1970 Act would remain frozen in place and provide coverage for all future insurer insolvencies. Further, petitioner has not shown that any past conduct of petitioner was altered by its legitimate expectation that prior law would remain forever unchanged or that petitioner incurred an unforeseen liability as a result of any legitimate reliance on prior law. American Mutual was not insolvent at the time petitioner purchased workers' compensation policies from American Mutual. Petitioner's repeated assertion at pages 16-17 and elsewhere in its petition that petitioner relied on the protections afforded by the 1970 Act when petitioner purchased its workers compensation insurance policies from American Mutual is unsupported by the record. Nor is it reasonable to assume that petitioner consulted the 1970 Act when petitioner obtained its workers' compensation insurance policies from American Mutual. *See* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960) ("many people do not bother to ascertain the niceties of the law in planning their conduct."). The adoption of the Act did not upset any legitimate settled expectations of petitioner.

Petitioner never had a vested property right under the 1970 Act to indemnity from a guaranty fund for workers' compensation claims. *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct.

1441, 1451-52 (1985) (the "well-founded presumption" is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise") (quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937)). The repeal of the 1970 Act and the enactment of the recoupment provision in 1988 leaving petitioner liable for work-related injuries of its employees hardly deprives petitioner of a vested property right in violation of petitioner's right to due process. *Id.*

Finally, the recoupment provision does not place a "severe" liability on petitioner as was the case in *Apfel*. It is not the recoupment provision which renders petitioner liable for workers' compensation benefits which it thought it had insured itself against. Petitioner is liable for the workers' compensation benefits under Rhode Island workers' compensation law that existed at the time of the injuries to petitioner's workers. As noted by the Rhode Island Supreme Court, petitioner is uninsured for such liability not because of the enactment of the recoupment provision but because the insurer from which petitioner elected to purchase insurance became insolvent in 1989 (after the recoupment provision was enacted). *Leviton*, 716 A.2d at 737.

In sum, this is not a case, like *Apfel*, where the legislature targeted a known entity for retribution and imposed a severe, disproportionate and retroactive liability. Petitioner has always been liable for its workers' injuries. The Fund has satisfied petitioner's obligations to petitioner's injured workers by paying those obligations. By such payments, the Fund has directly benefitted petitioner in an amount in excess of $1.5 million. If the Fund had not paid the workers' compensation claims of petitioner's employees, petitioner would have had to pay such claims out of petitioner's own assets. All the recoupment provision does is require petitioner (because it has a net worth in excess of $50 million) to reimburse the Fund for the payments the Fund made on petitioner's behalf. This is not severe, disproportionate or retroactive legislation. In circumstances where an insurer becomes insolvent, Rhode

Island, like twenty-four other states, has simply required insureds with a significant net worth to pay their own workers' compensation obligations instead of shifting such obligations to the Fund and ultimately to the insurance-buying public. The 1988 Act put this mechanism in place only for insolvencies which occur after the enactment of the 1988 Act. This is legislation with a rational public purpose accomplished in a rational manner.

C. *The Rhode Island Supreme Court's Decision Is Not In Conflict With The Decision Of The Oklahoma Supreme Court Relied On By Petitioner.*

The Rhode Island Supreme Court's decision is not in conflict with *State ex rel. John P.Crawford* v. *Guardian Life Ins. Co.*, 954 P.2d 1235 (Okla. 1998). First, the Oklahoma Supreme Court's decision in *Guardian Life* did not decide a constitutional issue. The court's decision in *Guardian Life* was limited to "the narrow issue" of whether the Oklahoma legislature intended the legislation at issue in *Guardian Life* to operate retroactively. *Guardian Life*, 954 P.2d. at 1237-38. The court did "not decide the issue of the constitutionality of applying the statute retroactively because [the court] found that the Legislature did not intend for it to be retroactively applied." *Id.* at n. 2. *Guardian Life* is not in conflict with the Rhode Island Supreme Court's decision because *Guardian Life* did not *decide* an important federal question. Therefore, *Guardian Life* does not present a "compelling reason" for this Court to exercise its discretion under Rule 10.

Moreover, *Guardian Life* presented a different issue than is presented here. *Guardian Life* involved a dispute between a receiver of an insolvent insurer (who is the successor to the insolvent insurer) and a reinsurer, over contractual obligations between the insolvent insurer and the reinsurer. This case, on the other hand, involves petitioner's statutory obligation to reimburse a statutorily created entity which satisfied certain of petitioner's liabilities. As the Rhode Island Supreme Court

correctly observed, "[T]he fund is not a party to the [American Mutual] policies and did not undertake any action to impair Leviton's contract. The fund's responsibilities are statutorily mandated and are not created by or subject to any private agreements." *Leviton*, 716 A.2d at 737. The Fund's rights and obligations arise solely out of the 1988 Act. *Honeywell, Inc.* v. *Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 551 (8th Cir.), *cert. denied*, 118 S. Ct. 156, *reh'g denied*, 118 S. Ct. 592 (1997). The 1988 Act, unlike the legislation at issue in *Guardian Life*, does not impair contractual obligations. *Id. See also* Section II, *infra*.

Finally, *Guardian Life* is not in conflict with the Rhode Island Supreme Court's decision here. In *Guardian Life*, the Oklahoma Supreme Court decided that the legislation at issue in *Guardian Life* operated prospectively to reinsurance contracts executed after the date the legislation went into effect. Similarly, the Rhode Island Supreme Court decided that the recoupment provision of the Act applies prospectively to insolvencies (such as the 1989 insolvency of American Mutual) which occurred after the enactment of the Act in 1988. The Rhode Island Supreme Court's decision is not in conflict with *Guardian Life*.

D. *Even If The Recoupment Provision Were Interpreted As Retroactive Legislation, It Easily Satisfies The Due Process Test For Retroactive Legislation.*

The Rhode Island Supreme Court decided that the recoupment provision does not operate retroactively and therefore found it "unnecessary . . . to analyze [the recoupment provision] further with regard to defendants' due-process rights." *Leviton*, 716 A.2d at 736. Should this Court elect to undertake a complete due process analysis, the petition should be denied because — as determined by the trial court below — the recoupment provision "still meets the minimal test of constitutionality under the Due Process Clause [because] a rational relationship exists between the statute and a legitimate public

purpose." *Rhode Island Insurers' Insolvency Fund*, 1996 WL 936930, at *4.[5]

The 1988 Act is an economic statute. *Leviton*, 716 A.2d at 734. *See also Metropolitan Property & Cas. Ins. Co.* v. *Rhode Island Insurers' Insolvency Fund*, 811 F. Supp. 54, 57 (D.R.I. 1993). Social and economic legislation that do not implicate fundamental rights "enjoy a presumption of constitutionality that casts a heavy burden on the party challenging them 'to establish that the legislature has acted in an arbitrary and irrational way.'" *Turner Elkhorn*, 428 U.S. at 15, 96 S. Ct. at 2892. Retroactive aspects of legislation meet the test of due process if the retroactive application itself is justified by a rational legislative purpose. *Brennan* v. *Kirby*, 529 A.2d 633, 640 (R.I. 1987), citing *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co*, 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).

The recoupment provision easily satisfies due process because, assuming *arguendo* that the provision has a retroactive application, such retroactive application is supported by legitimate legislative purposes furthered by rational means. The Act's recoupment provision is intended to deliver benefits to injured parties in immediate need, preserve the Fund's limited resources for legitimate claimants, limit the burden on the persons who purchase the types of insurance covered by the Fund and allocate available Fund resources according to need. *Leviton*, 716 A.2d at 734-35. *See also Attorney General ex rel. Dept. of Natural Resources* v. *Michigan Property & Cas. Guar. Ass'n*, 218 Mich. App. 342, 553 N.W.2d 700 (Mich. App. 1996), *aff'd*, 456 Mich. 590, 574 N.W.2d 751 (Mich. 1998); *Oakland County Bd. of Rd. Comm'rs* v. *Michigan Property & Cas. Guar. Ass'n*, 217 Mich. App. 154, 550 N.W.2d 856 (Mich. App. 1996), *aff'd*, 456 Mich. 590, 574 N.W.2d 751 (Mich. 1998). All the recoupment provision does is leave ultimate liability for compensation

[5] *See Bennett* v. *Spear*, 520 U.S. 154, 166, 117 S. Ct. 1154, 1163 (1997) (a respondent is entitled to defend the judgment on any grounds supported by the record even if not reached below).

benefits on the employer whose employees were injured. *Leviton*, 716 A.2d at 734-35. The provision does not impose a new liability on petitioner. Even if viewed as retroactive legislation, a provision allowing the Fund to recover from an employer having a $50 million net worth workers' compensation benefits paid by the Fund to satisfy the obligations of such employer to its injured employees is a rational means by which to achieve these legitimate legislative purposes. *Id. See Honeywell, Inc.* v. *Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547 (8th Cir.), *cert. denied*, 118 S. Ct. 156, *reh'g denied*, 118 S. Ct. 592 (1997) (retroactive application of amendment limiting guaranty fund coverage to Minnesota residents did not violate Contract or Due Process Clauses because state had a legitimate interest in regulating the insurance industry, easing the economic burden of its residents and ensuring the economic life of the guaranty association where the general purpose of the statute is to protect the future financial stability of individuals).

The 1988 Act provides Fund protection for insurer insolvencies which occur after the 1988 Act even if the injuries for which the Fund pays compensation occurred prior to the 1988 Act. The recoupment provision accomplishes a legitimate legislative purpose by rational means by allowing the Fund to recover payments from insureds with a $50 million net worth who are liable for such injuries, thereby preserving the Fund's limited resources, limiting the burden on the insurance-buying public, and allocating available Fund resources according to need. *Leviton*, 716 A.2d at 734-35.

In *Turner Elkhorn*, the Court found that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." *Turner Elkhorn*, 428 U.S. at 18, 96 S. Ct. at 2893. Similarly, the recoupment by the Fund of amounts paid by the Fund to satisfy petitioner's liability for workers' compensation benefits on account of past work related injuries of petitioner's employees is justified as a rational measure to impose

the cost of the employees' injuries on the employer (petitioner) who has profited from the fruits of such employees' labor. *See also United States* v. *Sperry Corp.*, 493 U.S. 52, 65, 110 S. Ct. 387, 396 (1989), *on remand to Sperry Corp.* v. *United States*, 925 F.2d 399 (Fed. Cir.), *cert. denied*, 502 U.S. 809, 112 S. Ct. 53 (1991) ("It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them"); *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 647, 113 S. Ct. 2264, 2292 (1993) (imposition of retroactive liability on employers is constitutional where liability is based on employer's conduct) (O'Connor, J. concurring). The recoupment provision is even more narrowly related to the 1988 Act's legitimate purposes than was the statute at issue in *Turner Elkhorn*. While the statute in *Turner Elkhorn* imposed liability where no liability had previously existed, the recoupment provision simply allows the Fund to recover from insureds who are already liable to their employees for work-related injuries where the Fund's payments satisfy that liability. Further, the recoupment provision permits recovery by the Fund only from those companies who have a significant net worth.

In sum, petitioner cannot meet its burden of establishing that the recoupment provision is unconstitutional. Even assuming *arguendo* that petitioner's legitimate settled expectations were upset (which the Fund disputes), and even assuming *arguendo* that petitioner incurred an unforeseen liability in legitimate reliance on prior law (which the Fund disputes) and even assuming *arguendo* that the recoupment provision operates retroactively (which the Fund disputes), the legislation clearly passes constitutional muster because any retroactive aspect is supported by legitimate legislative purposes furthered by rational means. Providing for the prompt payment of workers' compensation benefits to injured workers (even if those injuries arose from accidents pre-dating the Act) and providing for the financial stability of the Fund and the

availability of the Fund for claimants and insureds less able to bear economic loss than insureds with at least $50 million in net worth are legitimate legislative purposes. The recoupment provision is an entirely rational means by which to achieve these legitimate purposes.

II. THE RHODE ISLAND SUPREME COURT CORRECTLY DECIDED THAT THE RECOUPMENT PROVISION OF THE ACT DOES NOT IMPAIR A CONTRACTUAL OBLIGATION IN VIOLATION OF THE CONTRACT CLAUSE.

The Court analyzed the Contract Clause in *Energy Reserves Group, Inc.* v. *Kansas Power & Light*, 459 U.S. 400, 103 S. Ct. 697 (1983) and stated that "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Id.* at 410, citing *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 434 (1934). *See also United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 21, 97 S. Ct. 1505, 1517, *reh'g denied*, 431 U.S. 975, 97 S. Ct. 2942 (1977) (contract clause prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula).

The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Reserves*, 459 U.S. at 411, 103 S. Ct. at 704, quoting *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978). If there is a substantial impairment, the question becomes whether the State can show a legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. *In re Advisory Opinion to Governor (DEPCO)*, 593 A.2d 943, 949 (R.I. 1991). Finally, once such a purpose has been identified, the court must determine whether the adjustment of the contracting parties' rights and responsibilities is based upon reasonable conditions and is of a character appropriate to the

public purpose justifying the adoption of the legislation. *Energy Reserves*, 459 U.S. at 412, 103 S. Ct. at 705.

With regard to the first inquiry — whether the law operates as a substantial impairment of a contractual relationship — there are three components that must be reviewed: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. *General Motors Corp.* v. *Romein*, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109 (1992). The Rhode Island Supreme Court properly applied this analytical framework and determined that the recoupment provision did not substantially impair a contractual relationship. Although the Rhode Island Supreme Court did not proceed further with respect to its Contract Clause analysis, it is clear that even if *arguendo* the recoupment provision substantially impairs contractual rights (which the Fund disputes), the recoupment provision is appropriately supported by a legitimate public purpose. Accordingly, the petition should be denied. *Bennett* v. *Spear*, 520 U.S. 154, 166, 117 S. Ct. 1154, 1163 (1997) (a respondent is entitled to defend the judgment on any grounds supported by the record even if not reached below).

A. *The Rhode Island Supreme Court Correctly Decided That The Recoupment Provision Does Not Impair A Contractual Obligation.*

Petitioner argues that the provisions of the 1970 Act set forth the obligations of the insurer, the insured and the Fund in the event of American Mutual's insolvency, and that because petitioner allegedly purchased the American Mutual policies in reliance on the protections afforded by the 1970 Act, any alteration affecting this expectation (including the enactment of the recoupment provision in 1988) results in an unconstitutional impairment of petitioner's contract rights. Pet. 16-17.

The Rhode Island Supreme Court correctly rejected this argument:

> The inherent defect in this argument, however, is the fact that the fund is not a party to the insurance policies and did not undertake any action to impair Leviton's contract. The fund's responsibilities are statutorily mandated and are not created by or subject to any private agreements. It is therefore our opinion that the parties' contractual relationship was impaired by the insolvency of American Mutual in 1989 and its subsequent inability to perform the agreement, not by the enactment of the 1988 recoupment provision.

Leviton, 716 A.2d at 737. The Rhode Island Supreme Court's decision should not be disturbed.

Petitioner's assertions that the Fund "assumed" the contractual obligations of American Mutual under the 1970 Act and that the recoupment provision "nullifie[d] the express terms of the Fund's contractual obligation," Pet. 17, 21 are completely mistaken because the Fund has only statutory obligations. *Id.* The Fund has no contractual relationship with petitioner. The Fund was created in 1988 by the Act. Petitioner does not have any contractual rights against any guaranty association which could possibly be impaired because the rights and obligations of petitioner and the guaranty association are defined solely by statute. *See Honeywell, Inc.*, 110 F.3d at 551.

Furthermore, in deciding that the recoupment provision of the 1988 Act did not substantially impair petitioner's contract with American Mutual, the Rhode Island Supreme Court correctly determined that none of petitioner's reasonable contractual expectations were disrupted by the recoupment provision. *Leviton*, 716 A.2d at 737. Specifically, the court determined that petitioner had no right to assume that the benefits of the 1970 Act would remain forever available for future insolvencies that might occur. *Id.* (citing *Retired Adjunct Professors* v. *Almond*, 690 A.2d 1342, 1345 (R.I. 1997) (parties are not entitled to conclude that legislative provisions are "fossilized in legislative amber").

Petitioner is also incorrect in asserting that the recoupment provision "voided" or "completely vitiat[ed]" petitioner's contracts with American Mutual. Pet. 17. Petitioner's contracts with American Mutual were not disrupted at all by enactment of the recoupment provision. Petitioner was responsible for providing benefits for all work-related employee injuries. R.I. Gen. Laws § 28-33-1. Petitioner chose to insure this workers' compensation risk by entering into a contract with American Mutual. That contract has not been impaired at all by the enactment of the recoupment provision. The Rhode Island Supreme Court correctly observed that petitioner's contract with American Mutual was "impaired by the insolvency of American Mutual in 1989 and its subsequent inability to perform the agreement, not by the enactment of the 1988 recoupment provision." *Leviton*, 716 A.2d at 737.

In sum, the 1988 Act did not affect or impair any contract right of petitioner. Petitioner's contracts with American Mutual stand now as they stood before the 1988 Act. The 1988 Act left petitioner free to pursue whatever contractual claims it had against American Mutual by making a claim with the receiver of American Mutual. It is the deficiency in American Mutual's assets which makes petitioner's contractual rights less valuable, not the enactment of the 1988 Act. *Id.*

B. *Even If The Recoupment Provision Did Substantially Impair Contractual Rights, The Recoupment Provision Appropriately Serves Legitimate Public Purposes.*

Even assuming *arguendo* it were somehow determined that petitioner's contractual rights were substantially impaired by the enactment of the recoupment provision, the recoupment provision is still constitutional if the provision appropriately serves legitimate public purposes. *United States Trust*, 431 U.S. at 22, 97 S. Ct. at 1517. It is beyond question that the recoupment provision was enacted to serve legitimate public purposes. The recoupment provision was designed to ensure payment to injured employees while preserving the Fund's

limited resources. *Leviton*, 716 A.2d at 734-35.

These purposes are plainly sufficient to meet the "legitimate public purpose" standard. *See* Section I.D., *supra*. Indeed, that the recoupment provision meets this standard is confirmed by the fact that at least twenty-four other states have established similar net worth classifications in their respective guaranty fund statutes and that several courts of appeal have upheld the constitutionality of such classifications. *See Bain Peanut Co.* v. *Pinson*, 282 U.S. 499, 501-02, 51 S. Ct. 228, 229 (1931) ("[t]hat the provision in question is reasonable is made more probable by the fact that it had been adopted and sustained not only in Texas but in other States"). *See also Attorney General ex rel. Dept. of Natural Resources* v. *Michigan Property & Cas. Guar. Ass'n*, 218 Mich. App. 342, 553 N.W.2d 700 (Mich. App. 1996), *aff'd*, 456 Mich. 590, 574 N.W.2d 751(Mich. 1998); *Oakland County Bd. of Rd. Comm'rs* v. *Michigan Property & Cas. Guar. Ass'n*, 217 Mich. App. 154, 550 N.W.2d 856 (Mich. App. 1996), *aff'd*, 456 Mich. 590, 574 N.W.2d 751 (Mich. 1998); *Borman's Inc.* v. *Michigan Property & Cas. Guar. Ass'n*, 925 F.2d 160 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 85 (1992).[6]

If the public purpose test is met, the final question is whether the adjustment of contract rights is reasonable and appropriate to the public purpose. *Energy Reserves*, 459 U.S. at 412-13,103 S. Ct. at 705-06. Here, the Court must defer to legislative judgment. *See United States Trust*, 431 U.S. at 23, 97 S. Ct. at 1518. The test is not whether the recoupment provision was the wisest method which could have been adopted or a perfect method. Rather, the test is merely whether it is a reasonable method.[7] As discussed above, the

[6] Petitioner's citation to *Home Bldg & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 54 S. Ct. 231 (1934) for the proposition that only an emergency situation as dire as the Great Depression could justify the impairment of a contract (Petition p. 21, n.9) is manifestly without merit.

[7] Petitioner's contention at pages 18-19 of its petition that the recoupment provision is unnecessary because the 1988 Act contains a provision, R.I Gen. Laws § 27-34-8(a)(3), whereby the Fund obtains funds through assessments on member insurers, is without merit. The fact that the 1988 Act contains

reasonableness of the recoupment provision is apparent and is confirmed by the fact that numerous other states have enacted similar provisions. The recoupment provision is reasonable and appropriate to its public purposes of providing prompt payment to injured employees, preserving the fiscal integrity of the Fund, lessening the burden on the insurance-buying public and placing the burden on those insureds who are, in any event, liable for such injuries and who are determined by the legislature to be more able to bear the economic loss than insureds with a lesser net worth. *Leviton*, 716 A.2d at 734-35.

Petitioner's assertion that the rational basis test requires an evidentiary showing is incorrect. Pet. 18-19. Economic legislative choices are "not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC* v. *Beach Communications*, 508 U.S. 307, 315, 113 S. Ct. 2096, 2102 (1993). *See also Lyng* v. *Castillo*, 477 U.S. 635, 643, 106 S. Ct. 2727, 2732 (1986) (classification upheld based upon what Congress "might have reasoned"). The Rhode Island Supreme Court properly determined that the reasonableness and rationality of the Act are questions of law capable of resolution on the basis of the record before the court. *Leviton*, 716 A.2d at 735 (citing *Power* v. *City of Providence*, 582 A.2d 895, 902 (R.I. 1990)).

In summary, even assuming that petitioner's contractual rights were impaired by the recoupment provision (which the Fund asserts is not the case), the recoupment provision easily passes the contractual impairment test because the recoupment provision serves legitimate public purposes and any adjustment of the contracting parties' rights and responsibilities is based upon reasonable conditions and is of a character appropriate to such public purposes.

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a funding mechanism does not mean that the recoupment provision does not serve the purpose of preserving Fund resources where the assessments may prove to be inadequate and the separate purpose of limiting the burden on the public which ultimately pays for Fund assessments. R.I. Gen. Laws § 27-34-15.

CONCLUSION

For the foregoing reasons, respondent Rhode Island Insurers' Insolvency Fund respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Page

Affidavit of James Winskowicz dated April 12, 1996 . A-1

STATE OF RHODE ISLAND

SUPERIOR COURT

PROVIDENCE, SC.

Case No. 93-2505

RHODE ISLAND INSURERS' INSOLVENCY FUND

v.

LEVITON MANUFACTURING COMPANY, INC.

AND

AMERICAN INSULATED WIRE CORPORATION

AFFIDAVIT OF JAMES WINSKOWICZ

I, James Winskowicz, on oath depose and say:

1. I am Vice President — Claims of Guaranty Fund Management Services, an organization that handles claims by and against the plaintiff Rhode Island Insurers' Insolvency Fund (the "Fund").

2. I am submitting this Affidavit in support of plaintiff's motion for partial summary judgment and plaintiffs' dispositive motion to strike constitutional defenses.

3. As Vice President — Claims of Guaranty Fund Management Services, I have responsibility for overseeing claims paid by the Fund and collection of amounts owed to the Fund. I have personal knowledge of the records of the Fund and the manner in which such records are made and kept.

4. The Fund has asserted its right under R.I.G.L. §27-34-11(2)(a) to recoup from at least the following insureds covered claims paid by the Fund on behalf of such respective insureds under policies issued to such insureds by insurers determined to be insolvent: The Roman Catholic Bishop of Providence; Allendale Mutual; Amica Insurance; Cumberland Farms; Brown University; Citizens Bank; National Amusements and Leviton/American Insulated Wire.

5. All of the above listed insureds except the Roman Catholic Bishop of Providence, National Amusements and

Citizens Bank were insured under policies issued by American Mutual Insurance Company.

6. Of the above identified insureds from whom the Fund has sought to recoup payments pursuant to R.I.G.L. §27-34-11(2)(a), only Leviton/American Insulated Wire has refused to repay the Fund. The other seven insureds have reimbursed the Fund pursuant to R.I.G.L. §27-34-11(2)(a).

Signed under the pains and penalties of perjury this 12th day of April, 1996.

s/James Winskowicz
James Winskowicz

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Then personally appeared the above-named James Winskowicz and acknowledged the foregoing to be his free act and deed, before me,

s/Susan G. Pagliuca
Notary Public

My Commission Expires: 2/19/99

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